HOPKINS HEATING & COOLING,
INC.

VABCA - 4905E & 4906E

CONTRACT NO. V662C-1410

VA MEDICAL CENTER
SAN FRANCISCO, CALIFORNIA

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OPINION BY ADMINISTRATIVE JUDGE ANDERS

Hopkins Heating & Cooling, Inc. (Hopkins, Contractor or Applicant) submitted timely applications under the *Equal Access to Justice Act (EAJA),* 5 U.S.C. § 504, to recover attorneys fees alleged to have been incurred with its prosecution of its two appeals, VABCA - 4905 and 4906. On June 16, 1997, the Department of Veterans Affairs (VA or Government) responded to Hopkins' Applications. Hopkins replied to the Government's Response on June 19, 1997, and attached what it called its "Mediation Position Brief." We disregard any factual allegations contained therein for purposes of deciding this Application because it was not a part of the administrative record in VABCA - 4905 and 4906. 5 U.S.C. § 504(a)(1); *Balimoy Manufacturing Co. of Venice, Inc.,* ASBCA No. 47,006, 96-2 BCA ¶ 28,606. VABCA - 4905 involved the Contractor's appeal of a June 7, 1996, final decision terminating it for default on Contract V662C-1410. As reasons for the default action, the Contracting Officer cited "failure to complete the contracted work within the contract completion period," and went on to articulate various incidents attributing to this "unexcused" failure. VABCA - 4906 concerned an alleged overpayment in the amount of $66,334 which the VA sought to recover by final decision dated May 17, 1996. These Appeals were received and docketed on June 13, 1996. A consolidated Appeal File pursuant to Board Rule 4 was submitted by the Government on July 22, 1996. On October 24, 1996, Hopkins submitted a Supplemental Appeal File and reserved the right to submit further documents. The record before us consists of the pleadings and case files in VABCA - 4905 and 4906 (including the Stipulation of Settlement), the consolidated Rule 4 Appeal File (R4F), tabs 1 through 135, and the consolidated Rule 4 Supplemental Appeal File (R4 Supp.), tabs 1 through 86. The factual setting of these Applications is somewhat unusual. The parties consented to use an Alternate Dispute Resolution (ADR) process conducted on November 13 and 14, 1996, in San Francisco, California. The ADR procedure utilized a settlement judge and was non-binding in nature. As a result of the ADR, the parties agreed to settle the Appeals. A Stipulation of Settlement was entered into by the parties, and the Appeals were dismissed with prejudice on January 7, 1997, pursuant to that Stipulation. However, the parties failed to make their Stipulation of Settlement all-encompassing, and left the issue of attorney fees outstanding. Because of that decision, the Board, based on an incomplete record, must now adjudicate the *EAJA* issue without having adjudicated the underlying

disputes.

Statement of Facts

From its outset this Contract was contentious, and the relations of the parties only got worse as the work progressed. For purposes of this decision we will not recount each and every allegation and counter allegation. Rather, we will discuss the key facts that we find most persuasive pertaining to our determination as to the reasonableness of the Government's position. Turning to the record before us, the Appeals from which these Applications are made arose out of Contract No. V662C-1410, awarded to Hopkins on or about September 28, 1994, to make modifications and alterations of area separations and mechanical systems for "TB Infectious Control" at the VA Medical Center San Francisco, California (VAMC San Francisco). The Contractor was to be paid $810,469.86 for the work. (R4, tab 4) The notice to proceed was issued on November 29, 1994, and notified the Contractor that "[C]ontract performance must begin within (10) ten calendar days from the 19th of December and is not to exceed One Hundred Eighty (180) calendar days including project clean-up." (R4, tab 10) Richard C. Crowe was the Contracting Officer administering the Contract.

About one month later, on January 25, 1995, CO Crowe issued a Cure Notice noting that:

> [W]ork has not progressed satisfactorily on this contract. Specifically, I have not seen any work begin in the areas of construction since the Notice to Proceed was given to you.
>
> You must also remember that this contract start up time between now and the 19th of December was in addition to the 60 days deferment of the Notice to Proceed. Since 27 September, the contract date, until now, you have not performed materially on this contract.
>
> I also was informed today that you have not submitted the work schedule to the COTR [Contracting Officer's Technical Representative] . . . as you agreed to in our mid December 1994 meeting.

Satisfied that the Contractor's January 25th "submittals and final work plan" cured its noncompliance, the Cure Notice was retracted on April 7, 1995. The VA still noted to Hopkins that its "initial delinquency in starting" caused it to be delayed and "any contract period extensions needed would have to be negotiated with adequate consideration given to the Government." (R4, tab 24) Throughout April and May 1995, Hopkins continued to have various difficulties prosecuting the work and following up on the normal issues that arise in a construction project of this type. (R4, tabs 23-28) Work continued during June 1995, with the ongoing difficulties escalating. The record is replete with allegations and counter allegations between the Contractor and VA about who was responsible for the lack of progress, which we see no need to replay here.

Another Cure Notice was sent to Hopkins on June 16, 1995, directing it to respond with "immediate action" to resolve conditions that were "currently jeopardizing the health and welfare of the employees and patients." (R4, tab 45) The parties entered into Supplemental Agreement (SA) #1 on June 23, agreeing to a 28 day time extension to account for additional work. (R4, tab 50) Throughout July 1995, Hopkins continued to have difficulty providing adequate submittals and responding to the VA's requests for written documentation and cost proposals. (R4, tabs 59-59)

In August 1995, a problem also arose over a progress payment and escalated, with Hopkins threatening it would support "subcontractors that refuse to continue working." (R4, tabs 68, 69) The VA threatened that if Hopkins directed its subcontractors to abandon the project, the VA was reserving its right

to terminate for default. (R4, tab 70) That same day, CO Crowe also asked Hopkins to attend a meeting on August 21 to discuss the fact that the Contractor was 34 calendar days past the amended Contract completion date and "a new completion date needs to be negotiated with adequate consideration to [VA] for any further contract extensions." (R4, tab 71) The CO also mentioned that there were several outstanding change orders that needed to be negotiated and completed, and warned Hopkins that "if we cannot reach an agreement to the contract completion date on the 21st of August" he would "assess the extent of the work yet to be completed and assign a final completion date." (R4, tab 71) On August 25, Fred Hopkins wrote CO Crowe advising him that "the completion of work in Phase C, D and & E area will be September 8, 1995," except for Rooms 179 and 179A that were affected by a change order, and the room pressure sensors on which it had not received approval. (R4, tab 73)

Noting that Hopkins was currently 55 calendar days delinquent on its "revised completion date (minus any days allotted for Government initiated Changes)," on September 7, the CO directed the Contractor to submit a revised and updated work schedule that indicated "a true construction completion date," no later than 3:00 p.m. that same day. (R4, tab 81) Hopkins requested a meeting to discuss various issues which it described as intimidation, constant badgering, threats of removing Hopkins' project manager, unnegotiated directives, the late start, delay in completion, cure letters and "mean spiritedness that on the whole has taken the form of bias from the contracting officer." (R4, tab 83) As a result of that meeting, a punch list was developed on September 20, 1995, listing the outstanding items for Phases A, B, C, D, E, as well as general items. (R4, tab 85) A revised work schedule was submitted by Hopkins showing a new completion date of September 15, 1995. (R4, tab 86)

The punch list items were still not complete by November 6, and Hopkins was having difficulty getting its subcontractor on the project site to complete the work. (R4, tab 92) By letter dated November 17, the VA advised Hopkins that it was 10 days past due on its own date that it had given to complete the punch list items, and gave the Contractor until November 24 to complete the punch list or threatened it would bring in a new contractor to complete the work and collect actual and reprocurement damages from Hopkins. (R4, tab 98) On November 22, Hopkins requested a final inspection, excepting out several items. (R4, tab 100) CO Crowe wrote back on November 27 telling Hopkins to "submit a request for final inspection of the punch list items that were supposed to be completed on

7 November, 1995," and reminded the Contractor that "this project is over 133 days delinquent and every day that it continues unfinished, we must assess actual damages against your company." (R4, tab 100(b))

Problems with the project continued to intensify, particularly surrounding the parties' disagreement on whether work that Hopkins *alleged was* completed, *actually was* completed. (R4, tabs 101, 104, 106, 108) The Government asked Hopkins to send a comprehensive list of all incomplete work on the project, which it failed to do. (R4, tab 105) Subsequently, the A/E created an "interim inspection punch list" of outstanding items. (R4, tab 106) On December 13, Hopkins was told by CO Judy Infusino, another Contracting Officer on the project, and Chief of Purchasing and Contracting at the VAMC San Francisco, to correct the punch list items by December 20, or VA would make separate arrangements to complete the work and deduct the costs from the Contract. (R4, tab 110)

Mr. Hopkins wrote back claiming that the December 20 deadline was "unrealistic" since there were "16 pages of punch list items," some of which were of "pre-existing conditions," items that "cannot be completed until change orders are submitted and approved," and "just not the responsibility of this Contract." (R4, tab 111) Notwithstanding Hopkin's position, on December 18, CO Infusino again notified the Contractor that the December 20 completion date stood, and told it to complete the work by that date or the VA would "make separate arrangements to complete the work." (R4, tab 112) On December 20, Mr. Hopkins asserted in a letter to the VA that "all work under the base contract has been completed; therefore, I am requesting a final inspection." (R4, tab 113)

CO Infusino wrote the Contractor on January 8, 1996, revealing that "VA has contracted with another contractor to complete the unfinished or incorrect work" and intended to charge back all related construction costs to Hopkins." The VA also advised Hopkins it was no longer required to work on the outstanding punch list items, as these items would be completed by the secondary contractor. (R4, tab 116; R4 Supp., tab 72) That contractor generated a list of what it considered to be the deficient and/or remaining items in the Contract. The list was extensive. (R4, tabs 125, 129)

Soon thereafter, CO Crowe contacted the Contractor's surety, Contractors Bonding and Insurance Group, to inform it of Hopkins' "abandonment" of the project and incorrect and improper installation of some of the ductwork. (R4, tab 130) The Small Business Administration was also informed on April 10 of the situation and advised that there was a "newly discovered problem" with the HVAC balancing installed by Hopkins' subcontractor, and the VA intended to correct that problem by calling in the subcontractor to fix the work under the Contract warranty. (R4, tab 127)

On April 12, 1996, Hopkins disputed VA's November 1995 notification that it had made an erroneous progress payment of $66,000. (R4, Supp., tab 59; R4, tabs 118 and 128) Ultimately, CO Infusino issued a final decision on May 17, 1996, addressing the overpayment of the progress payment denying Hopkins claim and ordering it to remit a payment of $66,334, concluding:

> As explained to you on several occasions, the overpayment of $66,334 occurred when the VA Representative who processed the progress payment failed to adjust the "Less Previous Payment" amount of $586,639 from the Sixth (6th) Progress Payment dated 9/14/95. As you know two Sixth Progress payments were erroneously paid to your company (c.f. dated 9/14/9 and 10/17/95) The correct amount of "Less Previous Payment" should have been $652,973. The subsequent erroneous payment was approved with the understanding at the time that the entire amount paid to that date was only $586,639. The actual amounts paid by the Sixth Progress Payments (both the original . . . and the erroneous payment) was $625,973. Please remit your payment of $66,334.

(R4, tab 130)

On that same day, CO Infusino also wrote Hopkins asserting that "after a very thorough assessment of the work that your company performed under subject contract, several critical deficiencies and errors have been discovered in most of the work areas affected by this project." She attached the "interim inspection list of deficiencies that were discovered while the incomplete punch list items were being finished by the construction contractor called in to finish the items after you abandoned the project in late December, 1995." CO Infusino went on to write:

> I am directing you to immediately coordinate with Mr. Peter Nguyen to complete the attached deficiencies. You will have until close of business on the 7th of June, 1996 to mobilize, schedule, and complete the work associated with deficiencies in their entirety. Also, as part of the HVAC duct work problems, you must resolve the 18-20% leakage that currently exists in the duct work you installed.
>
> You are subsequently required to submit to Mr. Peter Nguyen a work schedule that will address these deficiencies. A final inspection of the reworked areas will be conducted after the 7th of June, 1996.

(R4 Supp., tab 79)

While Hopkins attempted to request intercession from VA's Office of Acquisition and Material Management in Washington, DC, , there is no evidence in the record that the Contractor attempted to respond directly to CO Infusino's directive. (R4 Supp., tab 80) By final decision dated June 7, 1996, CO Infusino terminated Hopkins for default. In her final decision, CO Infusino recounted the events leading up to her decision to issue the default:

> This contract is being terminated due to your failure to complete the contracted work within the contract completion period. As you know, you were more than 150 calendar days delinquent at the time I sent you my letter dated December 13 directing you to complete all associated work by December 20, 1995. However, you failed to complete the contract by that date and in January 1996, the VA was compelled to contract with another contractor to complete the project.
>
> During the performance period of the second contractor on this project, the Contracting Officer's Technical Representative (COTR) and the Government's Architect/Engineer for this project became aware of several more incomplete and incorrect contract items that were not identified in the interim inspection performed on December 7, 1995, at which you failed to attend (c.f. Contract Punch List Document, December 13, 1995).
>
> Due to the discovery in April 1996, of the incorrect and improper work associated with your contract, I again directed you on May 7, 1996, to immediately coordinate with Mr. Peter Nguyen, the Project Engineer/[COTR] to complete the items identified on the defective and complete work list and to do so by June 7, 1996. You again failed to contact the Project Engineer and to perform the contract work by this date.
>
> * * * * *
>
> Given the extent of your delinquent performance and your failure to complete the contract work as directed on the cited dates, I have determined that your failure to perform on this contract is not excusable as noted in FAR 49.402-3(j).

(R4, tab 131)

Hopkins appealed both final decisions, and on June 13, 1996, they were duly docketed by this Board as VABCA - 4905 (Termination for Default) and VABCA - 4906 (Progress Payment). As previously stated, the parties engaged in an ADR process, and settled the Appeals, resulting in an execution of a Stipulation of Settlement. In pertinent part, the Stipulation provided:

> 1. VA agrees to unilaterally withdraw/rescind the termination for default.
>
> 2. Hopkins agrees to complete the designated project

> mechanical and electrical work (with M30 being deleted) as set forth in the revised Interim Inspection List, a copy of which is attached hereto as Exhibit A and incorporated herein by reference.
>
> 3. Hopkins agrees to assign a new supervisor to the project, and VA agrees to assign a new Contracting Officer's Technical Representative (COTR) to said project, and the COTR or VA representative shall work closely with Hopkins and its subcontractors to make every effort to assure project completion.
>
> * * * * *
>
> 10. VA agrees to pay Forty Thousand Dollars ($40,000) to Hopkins to complete said project work as set forth in Exhibit A and in full and complete settlement of any and all claims, excluding Hopkins claim for attorney's fees pursuant to the *Equal Access To Justice Act*, whether known or unknown, which either party shall have against the other, including delay claims herein and reprocurement claims, excluding any warranty claims as set forth in Paragraph 14. Said payment shall be made upon completion of said work, and VA agrees to expedite payment upon said completion.

At the request of the parties and pursuant to the Stipulation, we dismissed the Appeals with prejudice on January 7, 1997, thus closing the record in VABCA - 4905 and 4906. The initial Fee Applications submitted prior to the dismissal becoming final were stayed until the Board's disposition became final. On May 7, 1997, Applicant submitted a request for compensation of 358 hours of legal fees at $125 per hour, totaling $44,752.41.

Discussion

Eligibility and Prevailing Party

In order for an applicant to recover attorneys fees and expenses under the *EAJA*, it must demonstrate that it meets *EAJA* size and net worth requirements, and that it is a prevailing party. Hopkins makes the general assertion that it "is a prevailing party and [that] the government's actions in issuing the termination for default were unjustified." The Government does not contest that Hopkins meets the *EAJA* size and net worth requirements, or that it is a prevailing party. Instead, it moves directly to argue that its position was substantially justified in both law and fact and the Application is "fatally defective" because Hopkins failed to identify with "sufficient specificity" the attorney fees it was requesting.

That Hopkins obtained favorable results through settlement using an ADR process, rather than through a decision on the merits, is immaterial in an *EAJA* proceeding. Attorney fees and expenses are not precluded where the parties agree to settle a matter in

lieu of further litigation so long as there is a "causal connection between the relief sought, the relief obtained, and the settlement of the litigation." *Austin v. Department of Commerce*, 742 F.2d 1417 (Fed. Cir. 1984); *Danrenke Corporation*, VABCA No. 3271E, VABCA No. 3601E, VABCA No. 3722E, 94-1 BCA ¶ 26,504; *Penn Environmental Control, Inc.,* VABCA Nos. 3599E, 3600E, 3725E, 94-1 BCA ¶ 26,326. The terms of the Stipulation of Settlement indicate that in withdrawing or rescinding the termination for default and agreeing to pay the Appellant $40,000, Hopkins succeeded on a significant issue in litigation which achieved some of the benefit it sought in bringing suit, and is therefore a prevailing party for *EAJA* purposes. *Hensley v. Eckerhart,* 461 U.S. 433 (1983); *Preston-Brady, Co.,* VABCA No. 1849E, 89-3 BCA ¶ 22,122.

Substantial Justification

Upon the applicant successfully demonstrating that it meets the *EAJA* size and net worth requirements, it has prevailed on at least a portion of its claim, and alleging that the Government's position was not substantially justified, the burden shifts to the Government to establish that its position was substantially justified. *Marino Construction Co., Inc.,* VABCA No. 2752E, 92-2 BCA ¶ 25,015; *Blosam Contractors, Inc.,* VABCA No. 2187E, 88-3 BCA ¶ 20,942. It is well established that the Applicant "has no burden to prove that the Government's position was not substantially justified." *Siska Construction Company, Inc.,* VABCA No. 3381E, 92-1 BCA ¶ 24,730 at 123,421. The Applicant is only required to allege that the VA's position was not substantially justified, which Hopkins has done. 5 U.S.C. § 504(a)(2).

Fees and expenses shall be awarded "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified." 5 U.S.C. § 504(a)(1). The Government is "substantially justified" if it is clearly reasonable in asserting its position, at the agency level and d